UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CASCADES CONTAINERBOARD PACKAGING-LANCASTER, A DIVISION OF CASCADES NEW YORK, INC.

and

Case No. 03-CA-210207

GRAPHIC COMMUNICATIONS CONFERENCE/ INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 503-M

BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE ON BEHALF OF RESPONDENT CASCADES CONTAINERBOARD PACAKGING-LANCASTER, A DIVISION OF CASCADES NEW YORK, INC.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Federal Statutes

Advice Memo

INTRODUCTION

Respondent Cascades Containerboard Packaging-Lancaster, A Division of Cascades New York, Inc. ("Cascades") submits this Brief In Support Of Its Exceptions to the November 23, 2018 Decision of Administrative Law Judge Kimberly Sorg-Graves ("ALJ").

According to the ALJ, Cascades violated Sections 8(a)(1) and (5) of the National Labor Relations Act ("NLRA" or the "Act") by failing to recognize and bargain with a Graphic Communications Conference/IBT Local 503-M ("Local 503") a labor organization that *never* demonstrated majority support from Cascades's employees. It did not.

As set forth at the hearing and as detailed more fully below, Local 27C Graphic Communications Conference, IBT ("Local 27") – *not* Local 503 – was certified as the exclusive bargaining representative of Cascades's employees. At some point prior to 2017, however, the Graphic Communications Conference of the International Brotherhood of Teamsters ("GCC") dissolved Local 27 and "administratively transferred" the assets, membership and bargaining rights of Local 27 to Local 503, an entirely different labor organization. The differences between Local 27 and Local 503 were dramatic, and what the ALJ now mischaracterizes as "ordinary, expected changes" actually were significant alterations of the most fundamental aspects of union membership, including dues and organization structure, bylaws, and the ability to vote as it relates to union affairs. Given these differences – which are clear in the record and which the ALJ inexcusably ignored – there was no continuity between Local 27 and Local 503, and thus Cascades had no obligation to recognize or bargain with Local 503.

Beyond the lack of continuity, Local 503 could not assume Local 27's representation status without first affording Local 27's members the opportunity to object to or otherwise question the dissolution of their union and the "administrative transfer" to Local 503. It did not.

As set forth more fully herein, *Raymond F. Kravis Center for the Performing Arts*, 351 NLRB 143 (2007), is inapplicable to union dissolutions – and even if it was not, we respectfully submit that it should be overturned in situations such as these. Employees' right to choose their own bargaining representative is among the most basic and important tenets of the Act. The ALJ's Decision here is predicated on the belief that union leaders – not employees – should be in control of such a decision, without providing employees any due process to object to their bargaining rights being traded at will from one union to another. This is directly contradictory to the Act's purposes.

Thus, for these reasons and those set forth more fully below, the ALJ's Decision should be reversed and the Complaint should be dismissed in its entirety.

PROCEDURAL HISTORY

On or around November 20, 2017, Local 503 filed an unfair labor practice charge (Case No.: 03-CA-210207), alleging that Cascades violated Sections 8(a)(1) and 8(a)(5) of the Act by repudiating its alleged collective bargaining agreement with Local 503 and withdrawing recognition from Local 503. (ALJ 1).[1]

On February 8, 2018, the Regional Director for Region 3 of the NLRB ("Region 3") issued a Complaint and Notice of Hearing, in which the Regional Director alleges that Local 503 serves as the exclusive bargaining representative of certain of Cascades's employees, and alleges further that Cascades repudiated its purported collective bargaining agreement with Local 503 and failed to and refused to bargain collectively and in good faith with Local 503, in violation of

[1] "(ALJ __)" refers to the November 23, 2018 decision of the ALJ. "(Tr.__)" refers to pages in the official transcript. "(GC Ex. __)" and "(R Ex. __)" and "(CP Ex. __)" refer to General Counsel's, Cascades's and Local 503's exhibits, respectively.

Sections 8(a)(1) and 8(a)(5) of the NLRA. (ALJ 1-2:1, GC Ex. 1). Cascades timely filed an Answer denying the substantive allegations on February 27, 2018.

The hearing on the Complaint was held before the ALJ on April 30, May 1 and May 2, 2018. (ALJ 2:1). The ALJ issued her Decision on November 23, 2018.[2] On December 12, 2018, the Office of the Executive Secretary granted in part an extension of time to file exceptions and a supporting brief until January 22, 2019.

STATEMENT OF THE FACTS

A. Overview Of Cascades

Cascades is a leading manufacturer of corrugated materials. (ALJ 2:12-14, Tr. 397). For decades, Cascades recognized Local 27 as the exclusive bargaining representative of its hourly production, maintenance and truck drivers at Cascades's Lancaster, New York facility. (ALJ 3:4-5, Tr. 426, GC Ex. 2). Cascades and Local 27 had a productive relationship, entering into repeated successive bargaining agreements, the last of which was effective from October 2, 2016 through October 1, 2020. (ALJ 5:4-5, GC Ex. 2, R Ex. 9).

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[2] On March 23, 2018, Region 3 filed a Complaint in United States District Court for the Western District of New York, seeking injunctive relief pursuant to Section 10(j) of the Act, pending disposition of the instant unfair labor practice proceedings. Cascades opposed the request. On July 30, 2018, United States District Court Judge Lawrence J. Vilardo denied in part and granted in part Region 3's application for preliminary injunctive relief. Judge Vilardo denied all requested preliminary injunctive relief – only requiring Cascades to recognize Local 503 for the purpose of arbitrating grievances. The Order also required Cascades to continue honoring the 2016 – 2020 collective bargaining agreement and holding union dues in escrow pending a final resolution of the proceeding before the NLRB – both actions which Cascades voluntarily took at the outset of the question concerning representation, prior to any Court directive. *See Murphy v. Cascades Containerboard Packaging – Lancaster*, 18-cv-00375 (W.D.N.Y. July 30, 2018).

B. Overview Of Local 27

As discussed in greater detail below, the GCC placed Local 27 in trusteeship in or around September, 2012. (ALJ 3:27, Tr. 230). Prior to being placed in trusteeship, Local 27 operated as a viable labor organization, representing 156 employees (approximately 85 of whom worked for Cascades) in the Buffalo-Niagara Falls area. (ALJ 3:11, 3:15-16, Tr. 38, CP Ex. 2). In addition to its officers (President Anthony Roman ("Mr. Roman") and Business Agent and Secretary/Treasurer David Mecca ("Mr. Mecca"), a former Cascades employee), Local 27 was governed by an Executive Board of elected members who met on a monthly basis and were responsible for the "day-to-day business" of the Local. (Tr. 71, 191, R Ex. 3). Local 27 had its own bylaws, which set forth the Union's benefits, dues structure and office requirements, along with its processes for, among other things, electing officers, authorizing strikes, modifying dues and modifying bylaws. (Tr. 180, 182).[3] Pursuant to such bylaws, Local 27 charged member dues in an amount equal to two (2) hours of pay per month. (Tr. 182). The ALJ determined no evidence existed that Mr. Stafford ever reviewed or applied the bylaws of Local 27 when implementing the trusteeship. (ALJ 4:18-19).

Prior to its trusteeship and eventual dissolution, Cascades employees comprised a significant portion of Local 27's membership – in 2012, approximately 85 of Local 27's 156 members were Cascades employees. (ALJ 3:15-16, Tr. 188, CP Ex. 2). The influence of Cascades employees, however, extended beyond membership numbers – at least three (3) of the Executive Board members (who, it bears repeating, were responsible for Local 27's "day-to-day business") worked for Cascades. (Tr. 71, 257). In other words, Cascades employees constituted

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[3] As set forth below, counsel for Cascades subpoenaed a copy of Local 27's bylaws from Local 503. Local 503 failed to produce a copy of the bylaws, though Mr. Stafford testified that he had possession of the bylaws, testified to their contents, and previously provided a sworn affidavit attesting that there existed differences in the bylaws of Local 27 and Local 503. (Tr. 180-182).

more than half of Local 27's membership, and exercised (or, at the very least, had the opportunity to exercise) significant control over Local 27's affairs itself. Beyond the monthly Executive Board meetings, Mr. Roman and Mr. Mecca conducted monthly meetings with Local 27 members at a VFW in Depew, New York (approximately seven (7) to eight (8) miles from the Lancaster facility), and maintained offices in Downtown Buffalo. (Tr. 45, 252, 256, 278).

C. Local 27's Trusteeship

In February 2012, following a plant closure, undescribed financial issues, and a claim of "benefit fraud," the GCC ordered the "Immediate Administrative Transfer" of Local 27 into Local 503, effective March 1, 2012. (ALJ 3:12-13, 3:17-20, 3:24-25, Tr. 326, R Ex. 2). After Local 503's President Mr. Stafford expressed concern over Local 27's financial liabilities however, the GCC decided instead to place Local 27 into trusteeship, appointing Mr. Stafford as sole trustee and removing all Local 27 officers from their former positions. (ALJ 3:25-4:1, Tr. 34, 161).

According to Mr. Stafford, this was done so he could "get [Local 27's] finances in order" prior to an administrative transfer. (Tr. 37). In other words, unbeknownst to Cascades, the goal of the trusteeship *always* was to transfer Local 27 into Local 503 – it never was intended to restore Local 27 to its position as a viable labor organization, representing the employees who chose *Local 27* as their exclusive bargaining representative. (Tr. 37 (Q: Okay. So what was the goal of the trusteeship? A: To get their finances in order. And then eventually, transfer them into a viable local. Q: Okay. And the viable Local being 503? A: 503.)).

Shortly after the trusteeship was implemented (i.e., in or around 2012), Mr. Stafford disbanded the Executive Board and assumed sole control over Local 27's operations. (ALJ 3:27-4:1, Tr. 72-73). Though Local 27 previously had its own dedicated President and Business

Agent, Mr. Stafford did not hire or appoint any other officers, and instead acted as Local 27's sole trustee in addition to his full-time responsibilities as President of Local 503.[4] (ALJ 4:5-7, Tr. 161). During Local 27's trusteeship, Mr. Stafford did not arbitrate a single grievance for Cascades' employees.[5] (ALJ 5:4-5, Tr. 45). He closed Local 27's office. (ALJ 4:2, Tr. 161). He discontinued Mr. Roman's and Mr. Mecca's monthly meetings with Local 27 membership. (Tr. 157). In fact, he did not even revise his business card to reflect his responsibilities for Local 27. (R Ex. 8).

D. Local 27's Dissolution And Purported Administrative Transfer

Local 27 remained in trusteeship until its dissolution sometime before April 1, 2017,[6] at which point the GCC "administratively transferred" Local 27's members, assets and liabilities to Local 503. (ALJ 5:14, Tr. 59). Despite Cascades decades-long bargaining history with Local 27, at no point during the trusteeship did Mr. Stafford inform Cascades of the GCC's intention to dissolve Local 27 or to "administratively transfer" its bargaining rights to Local 503. (ALJ 5:9-12). Though Mr. Stafford claimed the planned administrative transfer was "common knowledge," he could not testify to the contents of *any* conversation with anyone at Cascades

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[4] Mr. Stafford did so despite Local 503's bylaws, which state that the President is a "*full-time* salaried position," and noting that "Full-Time Officer(s) shall not be employed in the trade, outside the Local." (R Ex. 3, p.3) (emphasis added).

[5] Mr. Stafford claimed that he did not arbitrate any employee grievances because "[Local 27] just didn't have any money to – to fight grievances, to afford an arbitrator." (Tr. 45). At no point during the parties' negotiations of the 2016 collective bargaining agreements did Mr. Stafford request changes to the arbitration provisions or cost sharing arrangements. (Tr. 403). Nevertheless, the ALJ improperly accepted Mr. Stafford's testimony as fact that he never took a grievance to arbitration because of inadequate resources. (ALJ 5:23-24).

[6] Mr. Stafford failed to indicate the precise date when the dissolution of Local 27 occurred. Based on the evidence presented, the dissolution of Local 27 may have occurred at any time between October 19 or 20, 2016 (i.e., when the GCC Board voted to dissolve Local 27) through April 1, 2017 (i.e., the purported completion date of the administrative transfer).

regarding the transfer. (ALJ 5:8-9, Tr. 49). Given that no such conversation(s) took place, Mr. Stafford's total lack of recollection is understandable.[7]

In actuality, Cascades did not know – nor could it have had reason to know – that Mr. Stafford and the GCC were taking active steps to dissolve Local 27. During the pendency of the five (5) year trusteeship, Mr. Stafford negotiated, in Local 27's name and on Local 27's behalf, two (2) collective bargaining agreements with Cascades, both of which recognize Local 27 – *not* Local 503 – as the sole and exclusive bargaining representative of the Lancaster facility's employees. (ALJ 4:29-30, 5:4-5, GC Ex. 2, R Ex. 9). At no point during these negotiations (or otherwise) did Mr. Stafford state or suggest that Local 27 would soon cease to exist. (ALJ 5:8-12, Tr. 299). To the contrary, while negotiating the parties' 2016 contract – which took place mere months before the April 1, 2017 transfer – Mr. Stafford proposed changing the Union's name in the contract from "Local 27 Buffalo Pressmen" to "Local 27 GCC."[8] (Tr. 361, GC Ex. 36). His proposal made no reference to Local 503, nor do the negotiation notes reference any discussion about the then-upcoming administrative transfer. (ALJ 5:8-12, Tr. 361). Additionally, despite claiming to have made proposals relating to benefits available to Local 503 members during the 2016 negotiations, Mr. Stafford could not testify to a single conversation where such statements were made. (ALJ 5:5-9). The ALJ acknowledged no proposals, notes or

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[7] Mr. Stafford testified that he made Cascades aware of the planned transfer "[t]hrough conversation." (Tr. 49). When asked to identify the individual(s) with whom he had these conversations, Mr. Stafford testified "Pretty much, you know, we – kind of common knowledge. And at the time, Paul Shine was the one who – who originally started these negotiations, and then eventually got turned over to the three people that you see on the top." *Id.* He claimed later that, upon first meeting Mr. Shine, the transfer "would have – would have been brought up." (Tr. 202). Later, Mr. Stafford testified "They – I – we normally – we brought it up quite a lot – and the members knew, and everybody else knew." (Tr. 76).

[8] The ALJ curiously fails to mention this fact in her twenty (20) page decision.

contract provisions make reference to the availability of Local 503 benefits for Cascades's Local 27 members. (ALJ 5:9).

Neither Mr. Stafford nor the GCC informed Cascades of the administrative transfer when it went into effect on or before April 1, 2017. (ALJ 5:9-12). Instead, Cascades first became aware that Local 503 purported to represent Respondent's employees on April 7, 2017, after Local 503 filed an unrelated unfair labor practice charge against Cascades. (ALJ 5:6-9, GC Ex. 6). At the time of the filing, Cascades had no knowledge that Local 27 had dissolved or that the GCC had administratively transferred Local 27's bargaining rights to Local 503.[9] Counsel for Cascades refuted the allegations and more importantly, explicitly denied the existence of any bargaining relationship or obligation between Local 503 and Cascades.[10] To avoid confusion, and as Cascades had no reason to believe that its bargaining relationship with Local 27 had ceased, Cascades reminded Mr. Stafford repeatedly over the next several months that it was bargaining with him as Trustee of Local 27 – *not* as President of Local 503. (GC Ex. 9, 12-13, 15, 19-21, 23, 26-27). Ultimately, Cascades first received notice of Local 27's dissolution on October 27, 2017, when, as part of an unrelated legal proceeding, Local 503 provided Cascades with a letter from the GCC to Mr. Stafford detailing Local 27's dissolution and the administrative transfer of its assets, liabilities and responsibilities to Local 503. (ALJ 6:15-16, Tr. 435).

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[9] Cascades's Human Resources Manager, Michelle Rosowicz, did, on occasion, send correspondence to Mr. Stafford at his Local 503 address, and addressed to "Michael Stafford, President." (GC Ex. 7, 8). She did so because this was the title and address listed on Mr. Stafford's business card. (Tr. 408, R Ex. 8). At no point did Ms. Rosowicz believe that she was corresponding with Local 503 as the representative of Cascades' employees. (Tr. 409). The ALJ's decision entirely mischaracterizes Ms. Rosowicz's testimony and the explanation for why she addressed correspondence as she did. (ALJ 6:10-25).

[10] Ultimately, the parties agreed to a non-Board settlement wherein Cascades explicitly stated Local 503 is not the bargaining representative for its Local 27 members.

E. Local 503 Differs Significantly From Local 27

Local 503 is a notably different labor organization than Local 27. Though, again (and as addressed below), Mr. Stafford did not provide a copy of Local 27's bylaws, he admitted in a sworn affidavit to the Board that Local 27's and Local 503's bylaws differed in a number of significant respects, including with regard to the Executive Board, dues structure and benefits. (Tr. 180). Local 503's dues are higher than those charged by Local 27, and Mr. Stafford admitted that Local 503 intends to require the now-former Local 27 members to pay Local 503's higher dues rate. (ALJ 5:27-30, Tr. 220). It is geographically more difficult for Cascades employees to participate meaningfully in general membership meetings as, unlike Local 27 – which, prior to the transfer, conducted monthly meetings for members in nearby Depew – Local 503's monthly meetings take place in Rochester, New York, an hour-long drive from the Lancaster facility. (Tr. 370). To attend such meetings, Cascades' employees would need to travel *two hours* roundtrip (assuming good weather), presumably at a not insignificant cost.

Beyond these differences in bylaws, dues and geography (the impact of which should not be minimized, as such differences affect not only how the unions are governed, but how they financially impact and benefit their members), Cascades employees are notably less represented in Local 503, both in terms of representation on the Executive Board and in the overall membership. Whereas Cascades employees represented approximately 54% of Local 27's members, they comprise only 17% of Local 503. (ALJ 13:7-8, CP Ex. 2).[11] Moreover, while

[11] This is with giving Local 503 the benefit of the doubt regarding their claim that their LM-3 – which reports a membership of 935 – includes "honorary lifetime members," in addition to active, dues-paying members. Though Mr. Stafford testified that the number of actual members was 501 (the number from which our calculations are based), he later admitted that his records may be inaccurate and the number of active employees may be greater. (Tr. 355). The ALJ's decision questionably omits any mention of Mr. Stafford's acknowledgment that his numbers are potentially inaccurate.

three (3) Cascades employees sat on Local 27's Executive Board (and thus were responsible for the "day-to-day business" of Local 27), not a single Cascades employee sits on Local 503's Executive Board. (Tr. 260).[12] Pursuant to Local 503's bylaws, elections for Executive Board seats will not take place until November 2019 – over *two years after* Local 27's dissolution and the effective date of the purported administrative transfer. (R Ex. 3).

F. Cascades's Inability To Bargain With Local 503

As detailed above, Cascades learned on October 27, 2017 that Local 27 – the only union with which Cascades had a bargaining relationship – no longer exists. Cascades did not and does not have a bargaining relationship with Local 503, and had grave concerns about the GCC's purported right to transfer Local 27's bargaining rights for its own "administrative convenience." (GC Ex. 33). Thus, Cascades informed its Local 27 members that, during the pendency of the instant Board hearings, it would maintain the terms and conditions of their employment, except that Cascades would hold all dues deductions in escrow.[13] (GC Ex. 33).

To date, Cascades has not altered the terms and conditions of the Local 27 members' employment, except as noted above.

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[12] Mr. Stafford claims that he asked Local 27 employees after the administrative transfer whether they were interested in a seat on the Executive Board, but that they declined. Cascades's employee Joseph Nemerowicz recalled being asked whether he was interested in a seat, but denied declining such a position. (Tr. 260).

[13] Cascades has recognized Local 503 for the sole purpose of arbitrating grievances, as required by Judge Vilardo's July 30, 2018 Order.

ARGUMENT

CASCADES DID NOT VIOLATE THE NATIONAL LABOR RELATIONS ACT, AS IT HAS NO OBLIGATION TO BARGAIN WITH LOCAL 503

I. THE ALJ RELIED ON INAPPOSITE BOARD CASE LAW AND COMPLETELY DISREGARDED THE DUE PROCESS RIGHTS OF CASCADES'S EMPLOYEES

At the hearing, the ALJ, relying on the Board's decision in *Raymond F. Kravis Center for the Performing Arts*, 351 NLRB 143 (2007), precluded Cascades from submitting evidence regarding what (if any) due process rights employees had in the dissolution of Local 27 and the subsequent transfer to Local 503. (ALJ 8:36-38 fn.10).

Kravis, however, involved a merger of two unions – not a complete dissolution of an existing union – and thus is inapplicable to the case at hand. The Board's decision in *Kravis* was in direct response to the Supreme Court's decision in *NLRB v. Financial Institution Employees of America, Local 1182, Chartered by United Food and Commercial Workers International Union, AFL-CIO et al. (Seattle-First National Bank)*, 475 U.S. 192 (1986), the "essential holding [of which was] that the Board cannot discontinue an employer's obligation to recognize a union based on the union's *affiliating* with another union unless the Board determines that the affiliation raises a question concerning representation." *Kravis*, 351 NLRB at 146 (emphasis added). Thus, the Board determined, "an employer's duty to recognize an *incumbent union following affiliation* cannot be discontinued on the basis that union members were not allowed to vote on the affiliation . . . ." *Id.* (emphasis added).

The Supreme Court in *Seattle-First*, however, was clear that such rule applied to affiliations, as "an affiliation does not create a new organization, *nor does it result in the dissolution of an already existing organization*," and thus was akin to other, administrative organizational changes *Id.* (citing *Amoco Production Co.*, 239 NLRB 1195 (1979)) (emphasis

added). In other words, the *Seattle-First* decision hinges on the fact that an affiliation does not dissolve an existing union, and thus that decision, nor the subsequent decision in *Kravis*, applies here.

To the extent the Board held *Kravis* applies to dissolutions, we respectfully request the Board reconsider that position and overturn its decision. There are indisputable reasons for the Board to require due process in the event of a union dissolution and "transfer" of bargaining rights to a new entity. This cannot, like an affiliation, be likened to an "organizational development" – it instead represents a fundamental change to the employees' choice of bargaining representatives which the employees never asked for or otherwise authorized.

The NLRA conveys the right upon employees to freely select their own bargaining representative. If the Board does not distinguish the instant case from *Kravis*, as here a total dissolution of the majority selected bargaining representative occurred, the Board would establish a treacherous precedent. In no uncertain terms, affirming the ALJ's ruling would encourage international unions that have no rapport with smaller bargaining units and smaller locals to administratively transfer a local union voted for by employees into a larger local union and completely dissolve the union voted for by the employees.[14] Such a practice strips employees of their due process rights – treating employees and their rights as chattel that can be transferred without hesitation. Such a practice is not what the NLRA strives to accomplish, as it

[14] Both the ALJ (via her Decision) and Mr. Stafford (via his testimony) appear to assert that by *only* having approximately 156 members, Local 27 was financially unviable due to its "small" size. (ALJ 3:14-15). However, the NLRA allows for bargaining units containing as few as two dues paying employees and no statutory requirement exists with regard to how many members a local union must contain. The ALJ's reliance on a decrease in membership in Local 27 as a reason for "rubber stamping" the dissolution and administrative transfer into Local 503 is baseless and sets a dangerous precedent. The ALJ's Decision opens the door to unions running elections with a local controlled by employees in small units and then performing an "administrative transfer" to almost immediately devoid the employees of any local autonomy by dissolving the certified union originally voted for by the employees because it is purportedly not "financially viable." The NLRA does not assume that smaller bargaining units and smaller local unions are not fundamentally viable. Failing to reverse the ALJ's Decision would set an improper precedent that employee bargaining rights are transferrable at will.

prevents employees from exercising the very rights it statutorily provides. By reversing the ALJ and dismissing the Complaint, the Board can assure employees have the right to freely select their bargaining representative if the representative they selected is completely dissolved by a larger and unknown international union.

II. LOCAL 503 NEVER ASSUMED LOCAL 27'S BARGAINING RIGHTS

Despite never seeing the Local 27 bylaws, and "finding the record unclear as to how closely Local 27's bylaws were applied during the trusteeship, as there is no evidence that [Mr.] Stafford ever reviewed or specifically applied them[,]" the ALJ incorrectly and prejudicially determined she "cannot find the differences in the locals' bylaws . . . are sufficiently dramatic to alter the union's identity." (ALJ 4:18-19, 12:33-34, fn.14). When an existing bargaining representative merges or otherwise affiliates with another labor organization, the employer's duty to bargain continues only if the "identity of the representative remains essentially unchanged." *F.W. Woolworth Co.*, 285 NLRB No. 119, at slip op. 3 (1987). In order to ensure that "no one can substitute an entirely different representative in disregard of the established mechanisms for making such a change," the so-called "continuity of representative" requirement seeks "to determine whether the changes are so great that a new organization has come into being—one that should be required to establish its status as a bargaining representative through the same means that any labor organization is required to use in the first instance." *Western Commercial Transport, Inc.*, 288 NLRB 214, 217 (1988).

The Local 27 bylaws – the principal governing document setting forth all guiding principles, rules and regulations for a local union – never being reviewed or referenced by Mr. Stafford devastates any claim Local 503 has to assuming the bargaining rights of Local 27. The ALJ's acknowledgment of "numerous differences between the two locals' bylaws" – arguably

the most important consideration when determining continuity of representative – and subsequent failure to make an adverse inference against Local 503 for its failure to produce the bylaws casts doubt upon her entire decision. Accordingly, the Board must dismiss the Complaint as a thorough evaluation of continuity of representative between Locals 27 and 503 is impossible and Local 503 cannot assume the Local 27 bargaining rights without said continuity.

A. By Failing to Consider Local 27's Pre-Trustee Status, the ALJ Erred in Determining the Appropriate Time Frame from Which to Compare the Representational Factors for Purposes of Continuity

The ALJ evaluated the continuity of representation factors from the time period immediately before the April 1, 2017 administrative transfer and immediately after the transfer. (ALJ 12:10-12). The ALJ's decision to ignore the complete lack of continuity between Local 27 (at the time it was a financially sustainable local union) and Local 503 undercuts the validity of her entire decision, as she sets a dangerous precedent that allows any union to manufacture faux continuity. The decision allows an international union to place a local union in trusteeship (a decision over which the Board has no control) – without any say from the members the local union represents – introduce entirely new processes and significant changes, and then "administratively transfer" the original local union's bargaining rights to an unknown local union for which members never voted. Thus, a trusteeship would establish a continuity that would not otherwise exist – circumventing the continuity of representation requirement in its entirety. While this is problematic in its own right, it is of far greater concern given the ALJ's determination that employees are not entitled to due process safeguards (based upon the ALJ's reliance on inapposite Board case law). The Board should not allow unions to unilaterally manufacture continuity via trusteeship while simultaneously denying employees' the right to participate in or object to a dissolution and administrative transfer of their bargaining rights.

Doing so would abrogate the key purpose of the Act itself – the right for employees to choose their own bargaining representative. The ALJ's misinterpretation of analogous case law, coupled with her reliance on inapposite case law, creates the need for the Board to repair these wrongs by dismissing the Complaint.

Here, the ALJ should have analyzed continuity by comparing Local 27's pre-trustee status to those circumstances prevailing presently at Local 503. *Quality Inn Waikiki*, 297 NLRB 497, 497 n.1 (1989). However, the ALJ incorrectly adopted the General Counsel's position and disregarded facts related to Local 27's pre-trustee status. The Board's holding in *Waikiki* is clear – when the circumstances of a particular case "show that the changes under [a] trusteeship were extensive," the appropriate time period to examine for purposes of continuity of representation is the pre-trustee timeframe. *Id.*

In *Waikiki*, the circumstances warranting a review of the pre-trusteeship period included, *inter alia*, that the original Local's executive board members were suspended while the appointed trustee conducted all business; the original Local's bylaws were suspended; the new Local's business agent serviced the original Local's units; new bargaining units were organized; the trustees conducted all collective bargaining and all grievance adjusting for the original Local; all of the original Local's assets were transferred to the new Local, including the office equipment, files and bank accounts; and, the office of the original Local was closed and moved to the new Local's office. *Id.* With the exception of the suspension of the bylaws and the creation of new bargaining units, *each of these circumstances applies to the case at hand.* As a result of the trusteeship, Local 27's executive members were dismissed (ALJ 3:27-4:1, Tr. 160); Mr. Stafford served as Local 27's business agent (Tr. 35, 161); Mr. Stafford conducted all collective bargaining and all grievance adjusting for the original Local (ALJ 4:5-6, 25-27, Tr.

35); Mr. Stafford assumed control over all Local 27's assets, including its office equipment, files and bank accounts (ALJ 4:1-4, Tr. 197-198); and, Mr. Stafford closed Local 27's offices, and moved Local 27's operations to the existing Local 503 office (ALJ 4:2-3, 36-37, Tr. 161).

The ALJ improperly disregarded Cascades's argument regarding the manufactured faux continuity by Local 503. In doing so, the ALJ relied upon the Board's decision in *Mare-Bear, Inc., d/b/a Stardust Hotel & Casino*, 317 NLRB 926 (1995). (ALJ 10:26-30). In *Mare-Bear*, the international union placed the local union under emergency supervision for three months followed by nonemergency supervision. The international *never* dissolved the local union and never administratively transferred the bargaining rights to a different local union. Although *Mare-Bear* involves dicta relating to trusteeships, it does not address Cascades's concerns raised herein regarding Local 503 using a five (5) year trusteeship to establish "continuity" between the pre-administratively transferred union and the post-administratively transferred union.[15] At no point during the five (5) year trusteeship (nor any time prior to October 27, 2017) did Cascades have reason to believe Local 27 would not be financially rehabilitated by Mr. Stafford and remain the bargaining representative of the Cascades employees.

The ALJ's reliance on *Mare-Bear* is misplaced as is her unpersuasive attempts to distinguish *Waikiki* from the case at hand. The ALJ's focus on the reasons for why the union in *Waikiki* was placed into trusteeship is irrelevant – the rationale for creating a trusteeship has no bearing on continuity of representation. Likewise, the ALJ's mistaken assumption that Cascades somehow knew – at the time of the 2012 trusteeship that Local 27 would be dissolved and "transferred" to Local 503 – blatantly ignores the record, which shows that Cascades did not

[15] Cascades maintains its position raised to the ALJ that the trusteeship of Local 27 was presumptively invalid under Section 304(c) of Title III of the Labor-Management Reporting and Disclosure Act, which limits the presumptive validity of a trusteeship to eighteen (18) months.

know, nor did it have any reason to know that the GCC intended to take such drastic steps. In dismissing *Waikiki* as not controlling in this instant matter, the ALJ relies on the five (5) year bargaining relationship between Cascades and the trusted Local 27, while disregarding the overwhelming similarities stated above between the instant case and *Waikiki*. (ALJ 11:28-29).

B. Had The ALJ Analyzed the Appropriate Time Frame for Purposes of Continuity, She Would Have Determined That A Lack Of Continuity Existed Between Local 27 and Local 503

The ALJ – who incorrectly determined that the appropriate time frame for analyzing continuity was the time immediately before and the time immediately after the April 1, 2017 administrative transfer – perpetuated her error by finding continuity of representation. When examining the continuity between March 31, 2017 and April 1, 2017, after Local 503 spent five (5) years establishing continuity, it is expected that an objective factfinder would find continuity from one calendar day to the next. However, as stated above, the ALJ's time frame analysis is inherently incorrect, and leads to the compounding of improper determinations when analyzing continuity of representation. The ALJ's incorrect analysis of the appropriate time frame fundamentally devastates her assessment of the continuity of representation factors.

Though continuity of representation is based on a totality of the circumstances, factors relevant to the Board's analysis include:

> [C]ontinued leadership responsibilities by the existing union officials; the perpetuation of membership rights and duties, such as eligibility for membership, qualification to hold office, oversight of executive council activity, the dues/fees structure, authority to change provisions in the governing documents, the frequency of membership meetings, the continuation of the manner in which contract negotiations, administration, and grievance processing are effectuated; and the preservation of the certified union's physical facilities, books, and assets.

Waikiki, 297 NLRB at 497 n.1. If an affiliation, merger (or, as here, "administrative transfer") results in significant changes to the factors detailed above, there is no continuity of representation and thus no obligation to bargain. *See, e.g., Goad Co.*, NLRB Div. of Advice, No. 14-CA-25345, February 25, 1999. As set forth below, even a basic comparison of a pre-trustee Local 27 and Local 503 demonstrates a lack of continuity of representation.

1. The ALJ's Assessment of Continuity Factors is Disingenuous At Best

The ALJ inappropriately relies on several factors to establish continuity of representation. First, she cites to the Unit's union stewards remaining the same for the five (5) years preceding the transfer. (ALJ 12:20-21). These were not the stewards prior to the implementation of the 2012 trusteeship, and thus, can't be used to establish continuity with the previous Local 27. Second, she notes the newly negotiated 2016 collective bargaining agreement continues to be enforced. (ALJ 12:21). Cascades, however, negotiated this collective bargaining agreement with Mr. Stafford *as the trustee of Local 27* – Local 503 was *never* acknowledged during negotiations or in the collective bargaining agreement. Moreover, the ALJ ignores that Cascades is complying with the CBA's terms solely as part of the Board's 10(j) proceedings and not because the agreement actually is in effect. Third, she relies on the location of the Local 503 offices remaining the same as where Mr. Stafford conducted the business of the trusted Local 27 for years, while ignoring Mr. Stafford closed the Local 27 offices at the implementation of the trusteeship, which actually suggests a lack of continuity between the pre-2012 trusteeship Local 27 and Local 503. (ALJ 12:26-28).

Despite acknowledging several differences in representation – which suggest a lack of continuity – the ALJ glosses over them. (ALJ 13:1-8). Rather than credit them with proper

weight, she apparently determines the substantial differences are not significant enough to disrupt her determination of continuity.[16]

2. The ALJ Failed to Make an Adverse Inference against Local 503 for Failing to Produce Local 27's Bylaws, Which If Produced, Would Have Evidenced Substantial Differences between Local 27 and Local 503

As noted above, continuity of representation is contingent upon, among other things, a perpetuation of Local 27's membership rights and duties. Local 27's bylaws – which would detail the specific nature of such membership rights and duties – are thus critically important to any appropriate analysis of continuity. Local 503, however, failed to produce a copy of Local 27's bylaws, despite their undisputed relevance and the Board's issuance of a *subpoena duces tecum* compelling their production. This inexplicable – and unexplained – conduct warranted an adverse inference that the bylaws would have evidenced a lack of substantial continuity between Local 27 and Local 503 or, in the alternative, that the bylaws would have evidenced significant differences in Local 27's and Local 503's processes for membership rights and dues, eligibility for membership, qualification to hold office, oversight of the Executive Board, and authority to change provisions in Local 27's governing documents. Despite Cascades's request for an adverse inference, the ALJ inexplicably failed to make such an inference, though she admitted "there were likely numerous differences between the two locals' bylaws." (ALJ 12:34 fn.14).

The ALJ's refusal to make an adverse inference was an inexcusable and reversible error. The ALJ relies on the Board's decision in *CPS Chemical Co.*, 324 NLRB 1018 (1997) to justify

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[16] The ALJ's Decision mentions – but apparently ignores – that the Unit employees went from making up 54% of Local 27's membership to only 17% of Local 503's membership and that monthly Local 503 membership meetings are not held geographically close to Cascades, where Mr. Stafford held meetings to discuss local union business during the trusteeship. Rather, the monthly membership meetings are held in Rochester, New York – approximately two hours round trip from the Cascades plant. The ALJ declines to acknowledge the treacherous weather conditions in northwestern New York, which will jeopardize the safety of Unit employees that wish to attend monthly Local 503 meetings or that serve on the Local 503 board.

her misguided decision. *CPS Chemical Co.,* did not involve an adverse inference, or a union's total failure to produce subpoenaed and critically relevant documents. Rather, the ALJ claimed that because the difference in bylaws in *CPS Chemical Co.* were insufficient to constitute a significant change in a union's identity, any differences between Local 503's and Local 27's by laws could not be dispositive and thus no inference was necessary. This is improper. Whether evidence was critical to a different case, with different facts, has no bearing on whether such inference is appropriate here. Moreover, in *CPS Chemical Co.* not only did the employees *actually vote* to affiliate with another union, the ALJ *possessed* the bylaws of both unions and actually evaluated their differences. The ALJ should have made an adverse inference finding Local 503's failure to produce the Local 27 bylaws – an integral document in determining continuity of representation. Her failure to do so eviscerates the decision's rationale and justifies the Board in dismissing the Complaint once and for all.

By way of brief background, on or around April 16, 2018, Cascades served Mr. Stafford and/or the Custodian of Records for Local 503 with *Subpoena Duces Tecum* B-1-10TLZ7X, which sought production of, *inter alia*, "A copy of the last bylaws of Local 27, and of any previous bylaws from January 1, 2012 to present." (R Ex. 6). Mr. Stafford refused to produce the requested records, despite attesting in a November 28, 2017 sworn affidavit that he would provide the Board with a copy of Local 27's bylaws, and despite confirming that, at the time of his affidavit, he "must have had [the bylaws], yes."

Remarkably, Mr. Stafford had no explanation for why he did not produce the subpoenaed documents. (ALJ 4:24 fn.6). When asked why he failed to comply with the subpoena, Mr. Stafford's only response was:

A: I – I've provided a lot of material, so I don't recall everything – everything that has been provided.
Q: Do you think you provided the bylaws to who?
A: I don't recall.
Q: I mean, you just said you provided a lot of materials . . . . Who did you provide it to?
A: Yeah, I replied – provided a lot of materials to the attorneys.
Q: To your attorneys?
A: No, to the NLRB.
Q: To the NLRB. So maybe the NLRB has the – the bylaws?
A: Right. I don't know if they were provided. That was in my statement, I will. I don't know if they were.

(Tr. 180-182). Counsel for General Counsel confirmed subsequently that the Board was not in possession of Local 27's bylaws. *Mr. Stafford provided no further explanation for his failure to comply with Cascades's subpoena.*

It is well established that "when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him. *An inference may even be drawn that the material which the party refuses to show supports exactly the opposite of what he contends at the hearing.*" *National Football League*, 309 NLRB 78, 97-98 (1992) (emphasis added); *see also International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) v. NLRB*, 459 F.2d 1329, 1336 (1972) (same). The reason for the "adverse inference" rule is straightforward; namely, that:

> The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavorable to the party.

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), 459 F.2d at 1336.

While the adverse inference rule does not require that existence of a subpoena, "the willingness of a party to defy a subpoena in order to suppress the evidence strengthens the force of the preexisting inference." *Id.*

As noted above, the ALJ erred by failing to make an adverse inference here. Mr. Stafford did not produce an undeniably relevant document, despite admitting he previously was in possession of the bylaws; admitting that he had agreed previously to provide the Board with a copy of the bylaws; and, admitted that he previously had provided the Board with substantive information regarding the bylaws' content shortly after filing the unfair labor practice charge giving rise to the instant proceeding; and, admitting that he had agreed to provide the Board with a copy of the bylaws. Moreover, Mr. Stafford's sworn affidavit *admitted* that Local 27's bylaws differed with respect to, at minimum, the Executive Board, dues structure and benefits. (Tr. 180). His admission to these differences, and subsequent refusal to produce the document that would clarify the nature and scope of same, strongly suggests that Mr. Stafford purposefully withheld documents that would expose facts unfavorable to his position. His inability to explain the lack of production further supports this conclusion.

Given the key relevance of the bylaws and total lack of explanation for why the bylaws were not produced, the Board should correct the ALJ's mistaken determination by finding that the bylaws would evidence a total lack of continuity between Local 27 and Local 503 or, in the alternative, would evidence significant differences in Local 27's and Local 503's membership rights and duties.[17]

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[17] It should be noted that Local 27's bylaws remained in effect until its dissolution. Thus, this adverse inference would warrant a finding that no continuity existed between Local 27 and Local 503 regardless of whether the Board analyzed Local 27 prior to trusteeship or after trusteeship.

3. The Remaining Evidence Establishes A Lack Of Continuity

In addition to differences in their bylaws – both those differences that Mr. Stafford admitted, and those that the ALJ improperly failed to infer through adverse inference – Local 27 and Local 503 differed in a number of significant respects. As detailed above, Local 27's officers and agents were removed and replaced with Mr. Stafford (whom Local 27 never elected). (ALJ 3:27-4:1). Local 27's Executive Board was disbanded. Local 27 members will not be eligible for a seat on Local 503's Executive Board until November 2019, and thus have no ability to participate in the governance and management of their union. Local 27 employees soon will be subject to a new dues structure, which will require they pay increased dues amounts. (ALJ 5:27-30). Whereas Local 27 conducted monthly general membership meetings in nearby Depew, Local 27 members now must travel approximately two (2) hours roundtrip to attend Local 503 membership meetings. (ALJ 13:5-7). The Local 27 members working for Cascades went from composing a significant proportion of the membership of Local 27 (approximately 54%) to composing approximately 17% or less of the membership of Local 503. (ALJ 13:7-8). As a result, Cascades's Local 27 members' interests can easily be subsumed by the interests of the larger membership of Local 503—whose members live and work in a different and remote labor market.

These differences overwhelmingly evidence a total lack of continuity between Local 27 and Local 503. As no continuity exists, Cascades has no obligation to bargain with Local 503 and thus has not violated the NLRA. The ALJ's decision must be reversed and the Board should dismiss the Complaint in its entirety.

III. THE ALJ INCORRECTLY CONCLUDED THAT CASCADES IS BARRED BY THE STATUTE OF LIMITATIONS FROM RAISING THE LACK OF CONTINUITY BETWEEN LOCAL 27 AND LOCAL 503 AS A DEFENSE AGAINST ALLEGATIONS THAT IT WITHDREW RECOGNITION IN VIOLATION OF THE NLRA

An underlying theme of the ALJ's decision is Cascades had or should have had knowledge of the alleged administrative transfer and dissolution of Local 27 as early as April 1, 2017 – the date of the administrative transfer. The ALJ's baseless conclusory determination prejudices Cascades and improperly dilutes every valid argument raised by Cascades. The ALJ ignores the undisputed evidence that the first time Cascades received any indication of the administrative transfer of Local 27's bargaining rights and dissolution of Local 27 was October 27, 2017 via production of a letter to counsel for Cascades in an unrelated legal proceeding. (ALJ 6:15-16). In relying upon *CPS Chemical Co.* as the basis for finding a statute of limitations issue under Section 10(b) of the Act, the ALJ ignores the indisputable differences between *CPS Chemical Co.* and the instant case. As stated above, *CPS Chemical Co.* involved a merger-affiliation, not a complete dissolution and administrative transfer. Further, the employees in *CPS Chemical Co. actually voted* to affiliate with another union, unlike the instant case where the Unit employees were stripped of their due process rights and had their bargaining rights unknowingly transferred to a larger, different local (i.e., Local 503).

Without any basis in fact, the ALJ incorrectly determined that the dissolution of Local 27 was a foreseeable consequence of the administrative transfer. The ALJ cites no prior Board case law involving a dissolution and administrative transfer of bargaining rights that would suggest complete dissolution of a local union is a foreseeable consequence under the circumstances here. The ALJ's basis for assuming Cascades had knowledge of the dissolution of Local 27 and administrative transfer to Local 503 prior to October 27, 2017 is entirely unclear. The

undisputed credible testimony of Ms. Rosowicz established that until October 27, 2017, Cascades had no knowledge of the completion of the administrative transfer and resultant dissolution of Local 27 that occurred on or around April 1, 2017. The ALJ's unfounded determination of a non-existent statute of limitations issue requires the Board review the decision in its entirety and dismiss the Complaint based on the objective evidence.

IV. THE ALJ INCORRECTLY CONCLUDED THAT CASCADES UNILATERALLY MODIFIED ITS COLLECTIVE BARGAINING AGREEMENT WITH LOCAL 27

In furtherance of her prior incorrect findings, the ALJ determined that Cascades's refusal to arbitrate grievances brought by Local 503 under the collective bargaining agreement with Local 27 is a unilateral modification of the agreement. Once again, the ALJ is misguided. Cascades does not have a collective bargaining agreement with Local 503, nor, as set forth above, has Local 503 assumed Local 27's bargaining rights. As Cascades cannot modify an agreement that does not exist, the Complaint must be dismissed.

CONCLUSION

As set forth above, the ALJ's decision incorrectly examined the time frame of when to review continuity of representative; thereby making further incorrect and misplaced factual and legal determinations against Cascades. Local 503 never has represented Cascades' employees, nor does there exist any continuity in representation between Local 27 and Local 503. Local 503 cannot assume the bargaining rights of Local 27's employees – *who never chose Local 503 as their representative* – simply because doing so would be "administratively convenient." For all of the reasons detailed herein, this case against Cascades should in all respects be dismissed.

Dated: January 22, 2019

Respectfully submitted,

JACKSON LEWIS P.C.

By: _____

IAN B. BOGATY
HENRY S. SHAPIRO

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 3

CASCADES CONTAINERBOARD PACKAGING-LANCASTER, A DIVISION OF CASCADES NEW YORK, INC.

and Case No. 03-CA-210207

GRAPHIC COMMUNICATIONS CONFERENCE/ INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 503-M

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of January, 2019, I served a true copy of **BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE ON BEHALF OF RESPONDENT CASCADES CONTAINERBOARD PACAKGING-LANCASTER, A DIVISION OF CASCADES NEW YORK, INC.** *via* the National Labor Relations Board's electronic filing service and via electronic mail on:

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